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Page 1 of 2

[back](#)

Federal Court boss warned on job rule sidestep

EXCLUSIVE

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The top Federal Court bureaucrat was warned by her deputy the court could be in breach of public service rules after it hired a string of national registrars on lower classifications – then bumped up their salaries and titles to “get around” a limit on senior appointments.

Scott Tredwell, now the court’s general counsel but at the time its acting deputy principal registrar, emailed the chief executive, Sia Lagos, in October 2020 warning he had concerns about the use of special agreements to “in effect, get around the cap”.

Under public service rules, departments and agencies are not permitted to fill vacancies classified as senior executive service positions with staff employed on a lower classification but additional remuneration. At least five, however, were appointed in this way, an investigation by The Australian can reveal.

A 2018 confidential recruitment update for judicial registrar positions shows one candidate applied for a role in a classification known as Senior Executive Service Band 2 – or SES2. In the recommendations, it is noted the woman should be appointed to a lower Executive Level 2 level. “Would require allowance equivalent to SES1 or higher,” it read.

A second person considered

for an SES1 position had a similar recommendation.

One internal candidate was considered for a national judicial registrar position at an SES1 level. “No SES. But individual flexibility arrangement,” then Federal Court chief executive Warrick Soden wrote in September 2018. “(Another woman) is appointed to backfill (a) role as a Judicial Registrar, Legal 2, but with allowance equivalent to SES1,” the document reads. “NSW to receive additional resourcing of two Judicial Registrars (Legal 2) but with an allowance equivalent to SES1.”

Some internal promotions, the special deals known as individual flexibility arrangements show, were given pay rises of around \$50,000 a year despite ostensibly

remaining at the same level. Under public service rules, agencies and departments can apply more than one classification to a group of duties – a practice known as broadbanding. However, the rules say, this “does not apply to a group of duties to be performed by an SES employee”.

The string of new appointments came under Ms Lagos and led to the sidelining of several long-time registrars. It created disquiet within the Federal Court, and a complaint to the Australian Public Service Commission led to an extensive investigation.

The Australian reported on Tuesday that the APSC found one junior lawyer “did not hold an essential qualification for the position and no reasonable efforts

were made ... to determine whether she was eligible to be admitted to practice”.

But the APSC investigation, undertaken by the then acting assistant commissioner Kate McMullan, did not substantiate allegations of impropriety in the recruitment processes which resulted in the appointment of eight registrars under the arrangement because there had been “a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and work load”.

“I note that more clear and transparent communications from the FCA about the role review process, including the changing nature of the National Judicial Registrar role to allow it to be held at either a Legal 2 or (SES1) position level, may have been advisable to reduce the risk of misunderstanding,” Ms McMullen wrote in December 2020. “I have therefore recommended that future FCA role reviews or restricting exercises are communicated to staff in a transparent and clear way to reduce the risk of misunderstanding and/or misinformation.”

In correspondence sent during the preparation of the court’s response to Ms McMullen’s review two months before the conclusion of the investigation, however, Mr Tredwell wrote: “I have some concerns regarding our proposed statements in respect of the SES Cap and our use



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Page 2 of 2


back

of Individual Flexibility Agreements to, in effect, get around the cap”.

“I’m also wondering how our response sits as against the Public Service Classification Rules 2000, particularly 6 to 10,” Mr Tredwell, now the court’s general counsel, wrote in reference to regulations which ban the broadbanding of SES roles.

In a separate email obtained by The Australian, the court’s assistant people and culture director Matt Asquith admits the decision on whether to classify registrars into EL2 and SES1 bands is primarily based not only on the additional responsibilities undertaken, but “The SES cap the Court has, and if the positions can fit within the cap”.

These emails were not provided to Ms McMullen during her investigation. The Federal Court declined to comment.

A spokeswoman for the ASPC said: “A role evaluation is the method of determining the relative work value of a job through assessing the nature, impact and accountabilities of the role. It is not uncommon for positions with the same job title to be classified differently as a result of differences in one or more of the evaluation factors – for example, the scope and complexity of the role.

“A role evaluation which determines differing classifications for a role depending on the nature of the work involved is distinct and separate to a broadbanding arrangement.”

I have some concern regarding our proposed statements in respect of the SES cap and our use of Individual Flexibility Agreements to, in effect, get around the cap.

I’m also wondering how our response sits as against the Public Service Classification Rules 2000, particularly Rules 6 to 10.

Extract from acting deputy principal registrar Scott Tredwell’s email of October 26, 2020